

**FIRST AMENDMENT TO THE  
MEMORANDUM OF AGREEMENT BETWEEN THE COMMONWEALTH OF  
MASSACHUSETTS THROUGH THE MASSACHUSETTS DEPARTMENT OF  
ENVIRONMENTAL PROTECTION AND THE U.S. ENVIRONMENTAL PROTECTION  
AGENCY, NEW ENGLAND REGION**

This is the First Amendment to the Memorandum of Agreement entered into by and between the Commonwealth of Massachusetts, through the Massachusetts Department of Environmental Protection, and the U.S. Environmental Protection Agency, New England Region (“the Parties”) on January 10, 2005 (hereinafter referred to as “the 2014 Amended SER MOA”).

Pursuant to Section X (Modification) of the January 10, 2005 Memorandum of Agreement (hereinafter referred to as the “2005 SER MOA”), the Parties, by mutual agreement, and by their signatures below, amend the 2005 SER MOA as set out below.

WHEREAS, the United States Environmental Protection Agency (“EPA”) in September, 1983 listed the New Bedford Harbor Superfund Site located in the City of New Bedford, Massachusetts (“Site”) on the National Priorities List (“NPL”) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.* (“CERCLA”);

WHEREAS, by letter dated October 10, 1996, the Commonwealth of Massachusetts (“the Commonwealth” or “the State”), through the Department of Environment Protection (“MassDEP”) requested, in accordance with section 300.515 (f) of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 (“NCP”), that EPA include navigational dredging as an Enhancement of the proposed remedy for the Site;

WHEREAS, pursuant to Subpart E of the NCP, in November 1996 EPA issued a Proposed Plan for remediation of the Upper and Lower Harbor of the Site (“OU1”) including navigational dredging as a State Enhancement of the remedy;

WHEREAS, in September 1998, EPA issued a Record of Decision (“ROD”) for OU1 that included MassDEP’s requested Enhancement. In the ROD, EPA found that the Enhancement was not necessary to the selected Remedial Action but would not conflict or be inconsistent with the EPA selected remedy as long as the Commonwealth agreed to fund the costs associated with the Enhancement and that MassDEP agreed to assume the lead for supervising the Enhancement;

WHEREAS, the Commonwealth of Massachusetts, through MassDEP, concurred with the ROD and through that concurrence, the Commonwealth agreed to fund the costs associated with the Enhancement, which the Parties agree can include municipal (including any non-CERCLA match) funds for maintenance dredging and disposal, when and to the extent such funds became available and agreed to assume the lead for supervising the Enhancement;

WHEREAS, EPA and the Commonwealth, through MassDEP, recognize that the Enhancement shall consist of all or any part of the navigational dredging projects identified in the definition of

“Enhancement” in this MOA, which will be implemented by the New Bedford Harbor Development Commission (“NBHDC”), or another entity authorized by MassDEP,<sup>1</sup> and shall proceed as individual projects as funding becomes available;

WHEREAS, EPA recognizes that the NBHDC and MassDEP will enter into a separate MOA to define the roles and responsibilities of these parties for implementing and overseeing the Enhancement and that the NBHDC will procure one or more contractors to conduct and complete the Work and also retain an independent contractor to conduct daily oversight of the Work and to assist the NBHDC in the management and oversight of the Work;

WHEREAS, EPA further recognizes that while MassDEP will supervise the NBHDC and its contractor to ensure compliance with the performance, MassDEP will not be directly managing the Work being performed by the NBHDC’s contractors nor will MassDEP be responsible for or otherwise involved in managing the funding, procurement, or contract management associated with the NBHDC’s implementation of such Work;

WHEREAS, EPA and MassDEP agree that the Enhancement Work (“Work”) as defined herein shall be conducted under the provisions of §121(e) of CERCLA, which does not require any Federal, State, or local permits for the Work conducted within the Site, and further agree that the Work must meet certain Performance Standards as defined herein;

WHEREAS, MassDEP recognizes that the U.S. Army Corps of Engineers (“USACE”) has expertise in coordinating the regulatory review of dredging projects and will therefore coordinate the Enhancement Work with the USACE;

WHEREAS, MassDEP and EPA agree that the Enhancement Work shall end on or before the date EPA completes all Remedial Action at the Site;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants set forth herein, it is agreed as follows:

EPA and the Commonwealth, through MassDEP, hereby enter into the following Memorandum of Agreement (“Agreement”) for the New Bedford Harbor Superfund Site, New Bedford, Massachusetts.

## **I. INTRODUCTION**

This Agreement is entered into by EPA and the Commonwealth of Massachusetts, acting by and through MassDEP (each a “Party”, collectively the “Parties”) pursuant to CERCLA and the NCP. EPA and MassDEP agree to comply with all provisions specified in this Agreement.

## **II. PURPOSE OF AGREEMENT**

1. This Agreement defines the roles and responsibilities of the Parties for implementing the

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<sup>1</sup> Should MassDEP authorize an entity other than, or in addition to, NBHDC, all provisions applicable to NBHDC in this MOA shall also be applicable to any other MassDEP authorized entity.

Enhancement portion of the OU1 ROD for the New Bedford Harbor Superfund Site.

2. This Agreement ensures that the Enhancement does not conflict with or become inconsistent with the remedy for the Site and allows for both the Enhancement and the Remedial Action to move forward separately yet simultaneously, taking advantage of opportunities to streamline operations without jeopardizing public health or the environment.

3. This Agreement ensures that MassDEP provides adequate supervision of the Enhancement, including coordinating with the Regulatory Agencies in making determinations of compliance with the Performance Standards for the implementation of the Work. MassDEP supervision may involve the participation of or rely upon action by other Commonwealth agencies or departments.

### **III. SCOPE OF AGREEMENT**

This Agreement governs only the Enhancement portion of the OU1 ROD for the New Bedford Harbor Superfund Site. EPA shall remain the lead agency and MassDEP the support agency for the Remedial Actions at the Site. Should any provisions of this Agreement conflict with any provisions of the ROD, the ROD provisions shall prevail.

### **IV. DEFINITIONS**

As used in this Agreement, the following terms shall have the following meanings. In the absence of a definition in this Agreement, a term shall have the same meaning as in CERCLA or the NCP.

“Commonwealth of Massachusetts” or “the Commonwealth” or “the State” shall mean the Commonwealth of Massachusetts, including its departments, agencies and instrumentalities.

“MassDEP” shall mean the Massachusetts Department of Environmental Protection and any successor departments or agencies of the Commonwealth of Massachusetts.

“Enhancement” or “Enhancement Work” or “Work” shall mean all or any part of the proposed navigational dredging and disposal projects depicted on Attachment A to this Memorandum of Agreement, provided that:

- (1) The dredging and disposal projects are conducted entirely within the New Bedford Harbor Superfund Site;
- (2) The disposal facilities and any required mitigation measures and institutional controls are conducted entirely within the New Bedford Harbor Superfund Site and operation and maintenance of the disposal facilities is performed in such a way that ensures that the facilities are protective of human health and the environment; and
- (3) EPA has issued SOW and Work Plan consistency determinations for each project pursuant to Section V.C of this Memorandum of Agreement.

“Enhancement” or “Enhancement Work” or “Work” shall also mean all navigational dredging and disposal activities conducted pursuant to work plans approved prior to the date of this MOA for navigational dredging and disposal conducted during Phases II, III, and IV pursuant to the 2005 SER MOA.

“EPA” shall mean the United States Environmental Protection Agency, New England Region, and any successor departments, agencies, or instrumentalities.

“New Bedford Harbor Superfund Site” shall mean the shallow northern reaches of the Acushnet River estuary south through the commercial harbor of New Bedford and into 17,000 adjacent areas of Buzzards Bay.

“Performance Standards” shall mean the federal, state and local standards, requirements, criteria or limitation to which any navigational dredging project is required to conform to as determined by MassDEP, as lead agency, in coordination with the Regulatory Agencies.

“Regulatory Agencies” shall mean the Massachusetts Department of Environmental Protection, the Massachusetts Coastal Zone Management office, the U.S. Army Corps of Engineers, the National Fisheries Management Service, the U.S. Environmental Protection Agency, and other relevant state and federal regulatory programs.

“Remedial Action” shall have the same meaning as that set out in Section 101(24) of CERCLA.

“Response Actions” shall have the same meaning as that set out in Section 101(25) of CERCLA.

## **V. LEAD DESIGNATIONS, CERTIFICATIONS AND RESPONSIBILITIES**

### **A. Lead Agency Designation**

1. MassDEP will be the lead agency for the Commonwealth that supervises and reviews the conduct of the Enhancement Work at the Site pursuant to § 300.515(f)(1)(ii)(A) and (B) of the NCP.

2. EPA will continue to be the lead agency for overseeing implementation of the Remedial Action, including determining completion of all Remedial Action.

### **B. Lead Agency Certifications**

1. Once available, the State funding for the Enhancement will include the necessary personnel, materials, and services to properly monitor the Work. The Commonwealth agrees to fund the costs associated with the Enhancement.

2. MassDEP agrees that the Enhancement will not be funded from money currently residing in the Commonwealth of Massachusetts Operation and Maintenance Expendable Trust for the New Bedford Harbor Superfund Site that was specifically created to finance operation and maintenance of the remedy nor will MassDEP claim a credit against its state cost share of the Remedial Action under 40 C.F.R. §35.6285 for costs associated with the Enhancement or otherwise seek reimbursement of its costs from the Hazardous Substances Superfund established by 26 U.S.C. § 9507.

3. EPA and MassDEP agree that funds from the Commonwealth of Massachusetts Operation and Maintenance Expendable Trust for the New Bedford Harbor Superfund Site can be used to finance the operation and maintenance of the confined disposal facilities described in the ROD that contain both sediment dredged as part of the ROD remedy and navigational dredged material.

4. MassDEP agrees to maintain its lead agency status through the completion of the Enhancement.

C. Lead Agency Responsibilities

1. As recognized in this MOA, the navigational dredging projects that comprise the Enhancement Work will be implemented by the NBHDC, under the supervision of MassDEP. The NBHDC will procure the project contractor(s) and retain an independent contractor to conduct daily oversight of the Work and to assist the NBHDC in the management and oversight of the Work. Accordingly, the NBHDC will be responsible for preparing a Statement of Work (“SOW”) and a draft Workplan for each project, subject to MassDEP’s review and approval. Upon its approval of such documents, MassDEP will, in turn, submit them to EPA to make the “consistency determinations” specified below.

2. For each project to be implemented as part of the Enhancement, MassDEP shall submit to EPA New Bedford Harbor Superfund Site Project Managers (“EPA Project Managers”) a Statement of Work (SOW), prepared by the NBHDC and approved by MassDEP, that is sufficient for EPA to make a determination that the Work proposed in the SOW is conducted entirely onsite for the purposes of §121(e) of CERCLA and does not conflict with nor is inconsistent with the remedy, and is otherwise acceptable to EPA as an enhancement under Section 300.515(f)(1)(ii) of the NCP, (“the SOW consistency determination”). EPA shall issue the SOW consistency determination within thirty (30) days of receipt of the SOW.

3. MassDEP shall also provide a copy of the SOW to the Regulatory Agencies for review and comment.

4. After receiving EPA’s SOW consistency determination, MassDEP, in coordination with the NBHDC, USACE and the Regulatory Agencies, shall meet (“coordination meeting(s)”) to determine the Performance Standards that apply to the Work for each project and shall incorporate those Performance Standards into a draft Workplan, prepared by the NBHDC and approved by MassDEP, for each project of the Enhancement. MassDEP shall provide EPA Project Managers with a copy of each draft Workplan at least sixty (60) days before beginning the Work. Within thirty (30) days of receipt of the draft Workplan, EPA Project Managers shall issue a Workplan consistency determination to ensure that the Workplan does not conflict with nor is inconsistent with the remedy (“Workplan consistency determination”). If both parties agree, certain tasks in the Workplan may be initiated upon approval by EPA prior to issuance of the consistency determination.

5. MassDEP shall consult with USACE to ensure that coordination meetings with all Regulatory Agencies occur as needed during each project.

6. Upon request, MassDEP shall provide to the EPA Project Managers copies of submittals for the Work and provide for an opportunity for review and comment by the EPA Project Managers. MassDEP, within fifteen (15) working days of receipt of EPA Project Managers’ comments, shall provide in writing to EPA (or orally if the Parties agree) a rationale whenever EPA’s comments are not incorporated in the document.

7. MassDEP in coordination with the Regulatory Agencies shall ensure that the Work is

performed in a manner that is consistent with the final Workplan, EPA's consistency determinations and that the Work complies with the Performance Standards. EPA acknowledges, however, that the NBHDC, in implementing the Enhancement, is not acting as an agent of MassDEP, or the Commonwealth, and that the NBHDC and its contractors are responsible for compliance with the approved Workplan and the Performance Standards.

8. MassDEP shall ensure that all public participation requirements identified in the Performance Standards as well as other appropriate community involvement and public outreach efforts occur.

9. MassDEP shall ensure that all records that form the basis for the selection of each project of the Enhancement, the funding sources for each project of the Enhancement Work and any other documents that are consistent with the terms of this Agreement are maintained.

10. MassDEP, in entering into its MOA with the NBHDC, shall incorporate a provision requiring the NBHDC to provide access to the Work areas for employees and other authorized representatives of EPA for the purposes of complying with this Agreement.

## **VI. SUPPORT AGENCY DESIGNATION, CERTIFICATIONS AND RESPONSIBILITIES**

### **A. Support Agency Designation**

Except as noted in this document, EPA is the support agency for the Enhancement at the Site.

### **B. Support Agency Certifications**

EPA shall make best efforts to review the SOW and draft Workplan to make the consistency determinations in Section V. C. above in a timely manner but no longer than thirty (30) days after receiving the documents.

### **C. Support Agency Responsibilities**

EPA may attend meetings or provide comments on submittals pursuant to Section V.C. above. If EPA Project Managers request copies of submittals, EPA comments shall be submitted to MassDEP within fifteen (15) working days of receipt of the submittal unless another time period is agreed to by the Parties. EPA Project Managers' comments submitted to MassDEP do not constitute EPA concurrence on any or all points contained in the document and EPA's concurrence is not a prerequisite to State approval of any or all documents submitted to the State for the Work.

## **VII. TERMINATION OF THE AGREEMENT**

1. This Agreement will terminate on or before ten (10) years from the date of the last signature to this MOA or on the date of completion of the Remedial Action, whichever is earlier. At the termination of this MOA, if both Parties agree, the MOA may be extended for an agreed upon period of time but not beyond the date of completion of the Remedial Action.

2. EPA may stop the Work and terminate this Agreement if:

- (a) The Parties mutually agree;
- (b) EPA determines that conditions for MassDEP to be the Lead Agency are not achieved or maintained during the performance of the Agreement;
- (c) EPA determines that the Enhancement interferes or is inconsistent with the Remedial Action at the Site;
- (d) EPA determines that conditions at the Site pose or may pose an imminent and substantial endangerment to public health or the environment; or
- (e) EPA takes an enforcement action against any entity performing the Work.

3. Nothing in this Agreement obligates MassDEP or the Commonwealth to initiate or complete the Enhancement, and the Commonwealth, through MassDEP, may, in its sole discretion, terminate the Enhancement Work for any reason, including insufficient funding; if the Enhancement is implemented by an entity other than MassDEP, the Commonwealth or their authorized representatives, the permit exclusion provision in § 121(e) of CERCLA no longer applies and all necessary permits must be secured by the entity implementing the Work. Should the Enhancement Work terminate pursuant to this paragraph, the Commonwealth, through MassDEP, shall provide EPA with thirty (30) days advance written notice of and the reasons for the Commonwealth's proposed action and shall afford EPA an opportunity to respond, in writing or orally, to the Commonwealth's proposed action. Prior to the termination of the Enhancement Work, EPA shall identify any activities as necessary to ensure that the terminated Work does not conflict with nor is inconsistent with the remedy.

4. Except in the event that EPA determines that conditions at the Site pose or may pose an imminent and substantial endangerment to public health or the environment, prior to any EPA decision to terminate this Agreement and/or stop the Work, EPA will provide MassDEP with 30 days advance written notice of EPA's proposed action. In the event of conditions that pose or may pose an imminent and substantial endangerment to the public health or the environment, EPA will provide notice to MassDEP as soon as is practicable after the Work has stopped and/or the Agreement is terminated but no longer than five (5) days thereafter. All notices required by this paragraph shall include the reasons for EPA's decision to stop the Work and/or terminate the Agreement and will provide MassDEP with an opportunity to respond in writing or orally to EPA's action. MassDEP will be provided an opportunity to rectify the cause of any of the above notice(s) within 30 days after EPA's notice is issued. Except when EPA has terminated this Agreement and/or stopped the Work because EPA has determined that conditions at the Site pose or may pose and imminent and substantial endangerment to public health or the environment, MassDEP may dispute the decision by using the Dispute Resolution provisions in the New Bedford Harbor State Superfund Contract to resolve the dispute, except that neither party shall seek judicial resolution of the dispute.

## **VIII. POINTS OF CONTACT**

### State Project Manager

Paul Craffey

Joe Coyne

MADEP

Bureau of Waste Site Cleanup

One Winter Street

Boston, MA 02108

### EPA Project Managers

Dave Lederer

Elaine Stanley

Ginny Lombardo

U.S. EPA (HBO), Office of Site

Remediation & Restoration

5 Post Office Square, Suite 1100

Boston, MA 02109

Within fifteen (15) days of any changes in the points of contact, such change will be communicated to the other Party in writing.

## **IX. OTHER PROVISIONS**

1. EPA shall not be responsible for any harm to any person caused by the acts or omissions of any Commonwealth employees, or other representatives or agents of the Commonwealth during the course of the Work or during the course of any Commonwealth inspection of the Work. The Commonwealth shall not be responsible for any harm to any person caused by the acts or omissions of any EPA employees or other representatives or agents of EPA during the course of the Work or during the course of any EPA inspection of the Work.

2. This Agreement is intended to benefit only the Commonwealth of Massachusetts and EPA. It extends no benefit or right to any third party not a signatory to this Agreement.

3. EPA (including its employees, agents, contractors and other representatives) is not authorized to represent the Commonwealth or act on behalf of the Commonwealth in any matter relating to the subject matter of this Agreement. The Commonwealth (including its employees, agents, contractors and other representatives) is not authorized to represent EPA or act on behalf of EPA in any matter relating to the subject matter of this Agreement.

4. This Agreement does not constitute a waiver of EPA's right to bring an administrative or judicial action against any person(s) under Sections 104, 106, or 107 of CERCLA, or any other statutory provision or common law. This Agreement does not constitute a waiver of the Commonwealth's right to bring an action against any person(s) for liability under M.G.L. c. 21E, the Massachusetts Contingency Plan ("MCP"), of any other applicable statute or common law.

5. Any emergency response activities conducted pursuant to the NCP shall not be restricted by the terms of this Agreement.

6. Each Party reserve all rights provided them by CERCLA, the NCP, M.G.L. c. 21E, the MCP, and other State and Federal laws.

7. This Agreement shall not limit the authority of EPA New England Region or MassDEP to undertake response or enforcement actions pursuant to any environmental statute or regulation. Furthermore, this Agreement shall not limit the authority of any other federal or state agency or office to



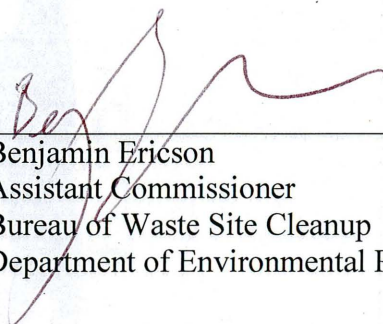
take response or enforcement actions pursuant to other federal or state statutes or regulations.

**X. MODIFICATION**

This Agreement may be modified or amended by mutual agreement of the Parties.

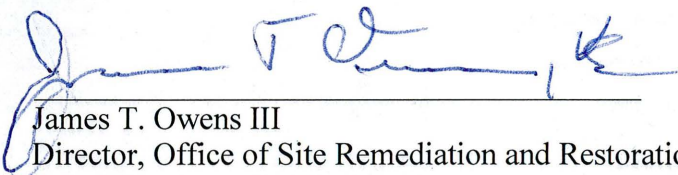
FOR THE COMMONWEALTH, BY AND THROUGH THE MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

1/8/15  
Date

  
\_\_\_\_\_  
Benjamin Ericson  
Assistant Commissioner  
Bureau of Waste Site Cleanup  
Department of Environmental Protection

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY-EPA NEW ENGLAND

1/6/15  
Date

  
\_\_\_\_\_  
James T. Owens III  
Director, Office of Site Remediation and Restoration  
U.S. EPA - New England Region

# Attachment "A" Proposed Dredging and Disposal Projects

2014 SER MEMORANDUM OF AGREEMENT

Amended Dredge Areas for the New Bedford / Fairhaven Harbor Plan (2008) Showing Additional Dredge Area from the MOA Update (2014)

Potential Waterfront Development Shoreline Facilities (WDSFs) and Dredge Areas

### Legend

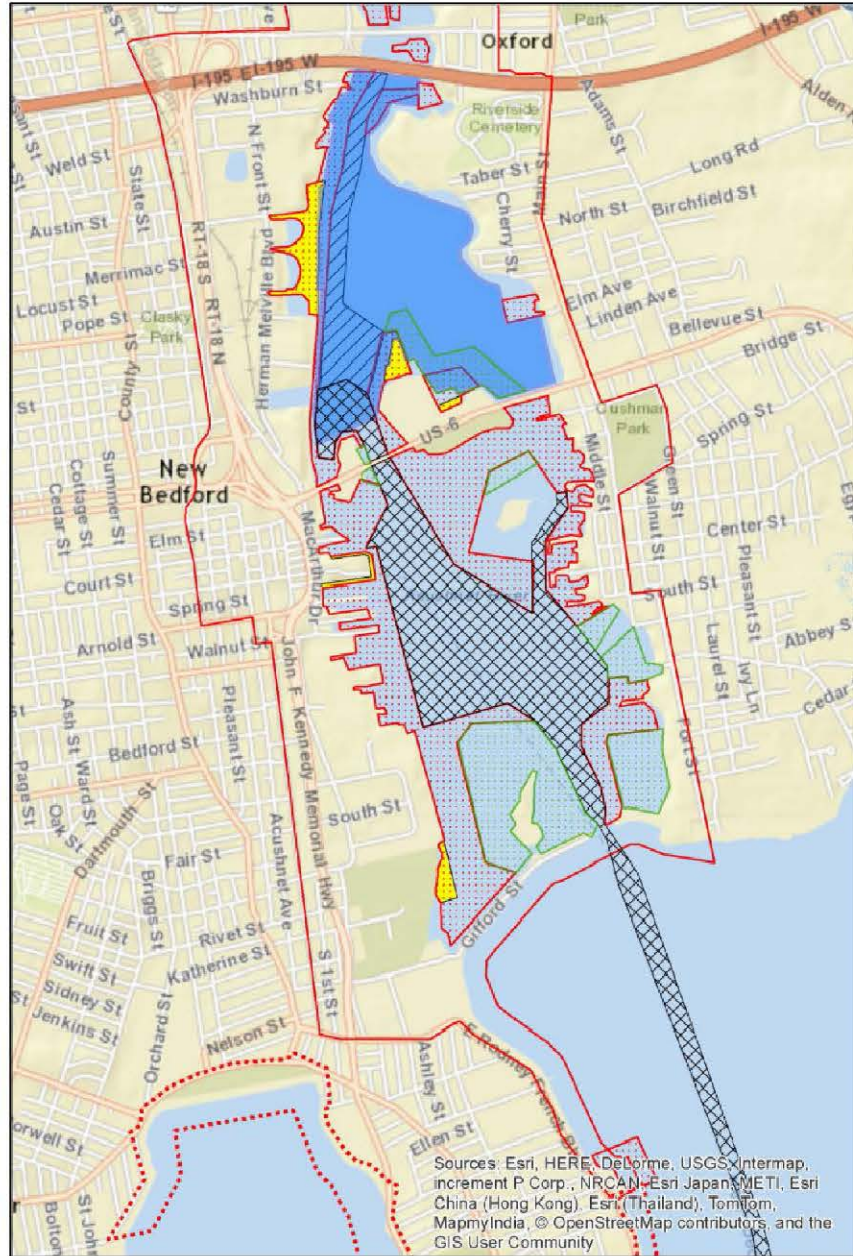
-  Potential Navigational Dredge Area\* - 2014 MOA Update
-  Army Corps & Navigational Dredge Project Areas
-  Boundary of CAD Cells & Related Navigational Dredging
-  Potential Navigational Dredge Area\*
-  Potential WDSFs
-  State/Other Channel Navigational Dredging
-  Secondary Planning Area
-  2008 Planning Area
-  Towns\_Poly

\* Based on individual properties with dredging needs.

Recreated based on a figure produced by Urban Harbors Institute of the University of Massachusetts, Boston For the New Bedford / Fairhaven Harbor Plan (2008)

The New Bedford / Fairhaven Harbor Plan 2008  
Produced by:  
Urban Harbors Institute  
Apex Companies  
and FXM Associates

Data from MassGIS  
City of New Bedford  
Town of Fairhaven  
Urban Harbors Institute  
Apex Companies, LLC



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